Supreme Court, U.S.
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No. 07-181

In The

Supreme Court of the United States

BRUCE TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE TURNER
Pro Se
U.S.P. Coleman 1 No. 24622-038
P.O. Box 1033
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QUESTIONS PRESENTED

1. In light of this Court's recent decision in *Cunningham v. California,* 549 U.S. ___ (2007) is defendant's Sixth and Fourteenth Amendment right violated when he is sentenced to a minimum mandatory prison term under the Armed Career Criminal Act (ACCA) because he is found at sentencing to have three (3) prior felony convictions (either violent crime or serious drug offenses) by a Judge but not mentioned to the Jury at trial.

2. Does the *Almendarez-Torres,* 549 U.S. ___ (2007) "prior conviction exception" apply to a defendant whose sentence has been enhanced (by a Judges finding) under the Armed Career Criminal Act (ACCA) i.e. three (3) prior felony convictions, when the defendant went to trial before a Jury in violation of 922(g)(1) (felon in possession of a firearm with one prior felony conviction and was convicted of only that violation).

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PETITION FOR A WRIT OF CERTIORARI

Bruce Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the First Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is found at Appendix A and is an unpublished decision of that court. The Relevant sentencing findings of the District Court are found at Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 2007. This petition is timely filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

18 U.S.C. § 922(g)(1) and section 2

> (g) It shall be unlawful for any person – (1) who has been convicted in any court of, a crime punishable by imprisonment for a term

exceeding one year; section 2 – to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2)

Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(e)(1)

In the case of a person who violates 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both . . . , such person shall be fined under this title and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence of, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

On May 14, 2003, a Grand Jury returned a one-count indictment against Mr. Bruce Turner charging him with being a felon in possession of two firearms in violation of 18 U.S.C. § 922(g)(1) along with co-defendant Ronald G. Smith with Aiding and Abetting said possession. Eight (8) months later, on November 5, 2003, a superseding indictment was returned dismissing co-defendant Smith from the indictment in return for his cooperation against Mr. Turner. The superseding indictment expanded the time frame of possession by approximately one (1) month and did allege that the defendant comported with the statute

18 U.S.C. § 922(g)(1), a non-violent crime; by including had "previously been convicted of a crime punishable by a term of imprisonment exceeding one (1) year." Notably, the indictment did not allege, that Mr. Turner had been convicted of three (3) prior and separate crimes which constitutes violent felonies or serious drug trafficking crimes.

On January 20, 2004, Mr. Turner proceeded to trial before the Honorable Judge Patti B. Saris and a jury. The jury returned a guilty verdict on January 23, 2004 only for violation of 18 U.S.C. § 922(g)(1). Note: the jury heard no facts pertaining to the Armed Career Criminal Act (ACCA) Enhancements, nor did Mr. Turner plea to them. On November 1, 2004, Mr. Turner was sentenced to 235 months (19.5 years) to be followed by 60 months of supervised release. Mr. Turner timely filed his appeal and on March 1, 2006, that court ruled that the case be remanded to the District Court for re-sentencing in accord with its decision. On July 17, 2006, Mr. Turner was re-sentenced by the Honorable Judge Patti Saris to 211 months (17.5 years) and advised by the District Court of his right to appeal. Mr. Turner timely filed his Notice of Appeal. The Court of Appeals entered a judgment affirming the District Court's ruling of July 17, 2006 on April 18, 2007.

REASONS WHY THE WRIT SHOULD BE GRANTED

The petitioner, Mr. Turner, respectfully urges this Honorable Court to grant this petition for issuance of a writ of certiorari to clarify the issue of the use of prior convictions for sentencing enhancement; when those

alleged prior convictions are not alleged in the indictment, plead to or proven by a Jury beyond a reasonable doubt.

Previously in the case of *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), this Court determined the fact of a prior conviction was not an element of the offense and did not have to be alleged in the indictment and proven by the government. 523 U.S. at 235.

Subsequent to *Almendarez-Torres,* this Court's ruling in *Shepard v. United States,* 125 S.Ct. 1254 (2005), the Honorable Justice Thomas, concurring in part and concurring in the judgment, wrote "*Almendarez-Torres* was wrongly decided." Moreover, in this Court's recent 2007 ruling in *Cunningham v. California,* 549 U.S. ___ (2007), the Honorable Justice Ginsberg, delivering the opinion, wrote "The question presented is whether the DSL (Determinate Sentencing Law), by placing sentence elevating fact-finding within the judge's province, violates a defendant's right to Trial by Jury Safeguarded by the Sixth and Fourteenth Amendment. We hold that it does."

The issue in *Cunningham* is the same as that of the petitioner's case. The DSL was California's determinate sentencing Law enacted by the state legislature to enhance recidivist behavior.

The DSL is the functional equivalent to the federal recidivist statute of the Armed Career Criminal Act (ACCA) requiring minimum mandatory sentence enhancements above the promulgated statutory maximum for the crime convicted. "Because the DSL allocates to Judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment." *Cunningham v. California,* 549 U.S. ___ (2007).

In lieu of this Court's subsequent rulings since *Almendarez-Torres*, as mentioned herein, this Court should grant Certiorari to clarify this extremely important constitutional issue, specifically as it relates to the Armed Career Criminal Act (ACCA) Enhancements which recur frequently throughout the country in all U.S. Circuits. Moreover, since many circuits including the U.S. Court of Appeals for the First Circuit in their rulings are refusing to address the issue while noting the petitioner's preservation by stating: "we will not anticipate an overruling or a sharp limitation of *Almendarez-Torres* by the Supreme Court," *Turner v. U.S.*, First Circuit Decision dated April 18, 2007 unpublished.

In essence, the circuit courts are refusing to address the constitutional violations until this Court steps up and directly addresses the issue head on with respect to the ACCA sentencing Enhancement. This further substantiates the importance of this issue as it relates to the constitutional infringement of liberties for many throughout the country. One particular case comes to mind in the First Circuit which sums up the vast majority of the other Circuits' reasoning for not wanting to address this issue even in light of Justice Thomas' finding that "a majority of the courts now recognize that *Almendarez-Torres* was wrongly decided." *Shepard v. United States,* 125 S.Ct. at 1264 and Justice Ginsberg's opinion in *Cunningham v. California,* 549 U.S. ___ (2007). That case is *United States v. Paige,* (citation omitted) First Circuit Court of Appeals judgment entered on August 31, 2005, in which the court reasoned the petitioner's sentence did not violate the Sixth Amendment and wrote: "The Supreme Court has, however, consistent with *Almendarez-Torres,* explicitly accepted prior convictions from its holdings in *Apprendi*, 530 U.S.

at 489, *Blakely*, 124 S.Ct. at 2536 and *Booker,* 125 S.Ct. at 156 [sic]," and "it is [the Supreme] Court's prerogative alone to overrule one of its precedents, *State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997) [citation omitted]; *Almendarez-Torres* continues to be good law, and therefore, prior convictions are not facts that must be admitted by defendant or proven beyond a reasonable doubt."

Petitioner, Mr. Turner, strongly urges this Court to grant certiorari and consider abrogation of *Almendarez-Torres* to eliminate the confusion, lack of consistency, and constitutional infirmity which exists among the Circuit Courts' rulings.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that this Honorable Court grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted by

BRUCE TURNER
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P.O. Box 1033
Coleman, FL 33521

Dated: July 30, 2007.

Resubmitted: August 9, 2007.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 06-2207

UNITED STATES,

Appellee,

v.

BRUCE TURNER,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Torruella and Howard, *Circuit Judges*.

JUDGMENT

Entered: April 18, 2007

Defendant-appellant Bruce Turner appeals from the sentence imposed upon him under the Armed Career Criminal Act (ACCA) for being a felon in possession of a firearm. *See* 18 U.S.C. §§ 922(g), 924(e). The government has moved for summary disposition pursuant to our Local Rule 27.0. Defendant opposes the government's motion as an unsuitable shortcut around full briefing, but we conclude that the pleadings before us are sufficient for a decision on the merits.

Turner first argues that the recent decision of the United States Supreme Court in *Cunningham v. California*, 127 S.Ct. 856 (2007) (striking down California's sentencing regime) re-opens the question of whether

Almendarez-Torres v. United States, 523 U.S. 224 (1998) is still good law. He further argues that the ACCA's limitation of predicate convictions to "violent" felonies or "serious" drug offenses implicates factual issues that must be treated according to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Turner has made clear that he intends to preserve his arguments in the face of existing law, and we acknowledge his right to do so. However, we will not anticipate an overruling or a sharp limitation of *Almendarez-Torres* by the Supreme Court. Neither the *Cunningham* decision nor the noted provisions of the ACCA change our view.

Although Turner received a prison term two years below the applicable guideline range, he contends that the district court imposed an unreasonably severe sentence by focusing too much attention on his recidivism to the exclusion of other relevant factors and by improperly considering a cargo theft conviction for which he received a separate, concurrent federal sentence of only eighteen months' imprisonment. The transcript belies Turner's contentions. Judge Saris heard arguments from both sides that addressed a wide range of sentencing considerations. She then explained that she would sentence below the guideline range, but was unwilling to go all the way down to the statutory mandatory minimum in light of Turner's record of recidivism and the cargo-theft conviction for which he received "a break" as to the length of imprisonment. The substantial weight that Judge Saris accorded factors militating towards lenience is implicit in her decision to sentence below the guideline range. Context makes clear that Turner's recidivism and his cargo-theft conviction were specifically noted by Judge Saris because they were two factors that persuaded her not to sentence at the statutory mandatory minimum (as she recalled having done in a previous case). The specific mention

these two factors received during the sentencing hearing does not indicate that other sentencing factors were ignored or discounted. The district court's conclusion that Turner's criminal record militated in favor of a sentence substantially above the statutory minimum was certainly reasonable.

Insofar as Turner contends that the district court increased the present sentence as a way of compensating for the relatively short prison term he received for the cargo theft, we conclude he misreads the record. The cargo theft was of a piece with Turner's general history of recidivism, and it was a much more serious offense than the prison term imposed reflects. The district court, in considering the significance of Turner's criminal history, could take note that it included an additional theft crime which, despite the light sentence it garnered, was quite serious.

The government's motion for summary disposition is *allowed*. The judgment is *affirmed*.

By the Court:

Richard Cushing Donovan,
Clerk.

By: Amy B. Lederer
Appeals Attorney.

Certified and Issued
as Mandate under
Fed. R. App. P. 41.

Richard Cushing Donovan,
Clerk

/s/ [Illegible]
Deputy Clerk

Date: 5/10/07

[cc: Raymond Mansolillo, Esq., John Capin, AUSA,
Dina Chaitowitz, AUSA]

APPENDIX B

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA	**AMENDED JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: **1: 03 CR 10166-001-PBS**
BRUCE TURNER	USM Number: 24622-038
	Robert L. Sheketoff, Esq.
	Defendant's Attorney

☐ Additional documents attached

Date of Original Judgment: 11/1/04

☑ Case remanded for resentencing in light of United States v. Booker, 543 U.S. 220 (2005)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 of a Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Additional Counts – See continuation page ☐

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 922(g)(1)	Felon in Possession of a Firearm	01/24/03	1s

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

07/17/06
Date of Imposition of Judgment

/s/ Patti B. Saris
Signature of Judge

The Honorable Patti B. Saris
Judge, U.S. District Court
Name and Title of Judge

7/19/06
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 211 month(s)

☐ The court makes the following recommendations to the Bureau of Prisons:

A recommendation to FMC Devens and the 500 Drug Treatment Program.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

☐ See continuation page

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 60 month(s).

Defendant is to participate in substance abuse testing and treatment.

Defendant is to participate in mental health counseling.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 tests per year, as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
			☐ See Continuation Page
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The $100.00 Special Assessment is due immediately (unless already paid).

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ See Continuation Page

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☑ **The court adopts the presentence investigation report without change.**

B ☐ **The court adopts the presentence investigation report with the following changes.**

(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.) (Use Section VIII if necessary.)

1 ☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

2 ☐ **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II **COURT FINDING ON MANDATORY MINIMUM SENTENCE** (Check all that apply.)

A ☐ No count of conviction carries a mandatory minimum sentence.

B ☑ Mandatory minimum sentence is imposed.

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case

☐ substantial assistance (18 U.S.C. § 3553(e))

☐ the statutory safety valve (18 U.S.C. § 3553(f))

III **COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):**

Total Offense Level: 23
Criminal History Category: VI
Imprisonment Range: 235 to 293 months
Supervised Release Range: 2 to 3 years
Fine Range: $7,500 to $75,000

☑ Fine waived or below the guideline range because of inability to pay.

IV **ADVISORY GUIDELINE SENTENCING DETERMINATION** (Check only one.)

A ☐ **The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.**

B ☐ **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** (Use Section VIII if necessary.)

C ☐ **The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.** (Also complete Section V.)

D ☐ **The court imposed a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

V **DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES** (If applicable.)

A **The sentence imposed departs** (Check only one.):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ 5K1.1 plea agreement based on the defendant's substantial assistance

☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program

☐ binding plea agreement for departure accepted by the court

☐ plea agreement for departure, which the court finds to be reasonable

☐ plea agreement that states that the government will not impose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ 5K1.1 government motion based on the defendant's substantial assistance.

☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program

☐ government motion for departure

☐ defense motion for departure to which the government did not object

☐ defense motion for departure to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.)

☐ 4A1.3 Criminal History Inadequacy

☐ 5H1.1 Age

☐ 5H1.2 Education and Vocational Skills

☐ 5H1.3 Mental and Emotional Condition

☐ 5H1.4 Physical Condition

☐ 5H1.5 Employment Record

☐ 5H1.6 Family Ties and Responsibilities

☐ 5H1.11 Military Record, Charitable Service, Good Works

☐ 5K2.0 Aggravating or Mitigating Circumstances

☐ 5K2.1 Death

☐ 5K2.2 Physical Injury

☐ 5K2.3 Extreme Psychological Injury

☐ 5K2.4 Abduction or Unlawful Restraint

☐ 5K2.5 Property Damage or Loss

☐ 5K2.6 Weapon or Dangerous Weapon

☐ 5K2.7 Disruption of Government Function

☐ 5K2.8 Extreme Conduct

☐ 5K2.9 Criminal Purpose

☐ 5K2.10 Victim's Conduct

☐ 5K2.11 Lesser Harm

☐ 5K2.12 Coercion and Duress

☐ 5K2.13 Diminished Capacity

☐ 5K2.14 Public Welfare

☐ 5K2.16 Voluntary Disclosure of Offense

☐ 5K2.17 High-Capacity, Semiautomatic Weapon

☐ 5K2.18 Violent Street Gang

☐ 5K2.20 Aberrant Behavior

☐ 5K2.21 Dismissed and Uncharged Conduct

☐ 5K2.22 Age or Health of Sex Offenders

☐ 5K2.23 Discharged Terms of Imprisonment

☐ Other guideline basis (*e.g.*, 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use Section VIII if necessary.)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM (Check all that apply.)

A **The sentence imposed is** (Check only one.):

☑ below the advisory guideline range

☐ above the advisory guideline range

B **Sentence imposed pursuant to** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court

☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable

☐ plea agreement that states that the government will not impose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ government motion for a sentence outside of the advisory guideline system

☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object

☑ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

☑ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)

☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))

☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))

☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))

☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))

☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use Section VIII if necessary.)

THIS CASE WAS REMANDED FOR RE-SENTENCING IN LIGHT OF BOOKER. I IMPOSED A SENTENCE OF 211 MONTHS RATHER THAN THE LOW-END GUIDELINE SENTENCE OF 235 MONTHS BECAUSE, AS I SAID IN THE INITIAL SENTENCING, THE GUIDELINE RANGE SEEMED DISPROPORTIONATELY HIGH GIVEN THE NATURE AND CIRCUMSTANCES OF THE UNDERLYING OFFENSE, I VARIED BY ONE OFFENSE LEVEL. I DID NOT VARY MUCH BECAUSE OF THE SERIOUS CRIMINAL HISTORY.

VII COURT DETERMINATIONS OF RESTITUTION

A ☐ Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.:
000-00-4486

Defendant's Date of Birth:
00/00/69

Defendant's Residence Address: Saugus, MA

Defendant's Mailing Address:
USP Big Sandy, KY

Date of Imposition of Judgment
07/17/06

/s/ Patti B. Saris
Signature of Judge

The Honorable Patti B. Saris
Judge, U.S. District Court
Name and Title of Judge

Date Signed 7/19/06